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No. 86-1149

In the Supreme Court of the United States

OCTOBER TERM, 1986

LARRY CUNNINGHAM AND DEVORA CUNNINGHAM,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's admission of evidence of a third party's prior conviction was harmless error.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

United States v. *Lane*, No. 84-744 (Jan. 27, 1986) .. 5
United States v. *Winley*, 638 F.2d 560 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982) 6

Constitution, statutes and rules:

U.S. Const. Amend. V 6
18 U.S.C. 371 2
18 U.S.C. 472 2
Fed. R. Crim. P. 52 6
Fed. R. Evid.:
Rule 103(a) 6
Rule 103(d) 6
Rule 401 5
Rule 801(d)(2)(E) 6
Rule 804(b)(3) 4, 6

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-13) is reported at 804 F.2d 58.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1986. The petition for a writ of certiorari was filed on December 27, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioners were each convicted on one count of conspiracy to pass counterfeit money, in violation of 18 U.S.C. 371 and 472, and several substantive counts of passing counterfeit money, in violation of 18 U.S.C. 472 (Pet. App. 1). Petitioner Larry Cunningham was sentenced on the conspiracy count to a suspended five-year term of imprisonment and placed on three years' probation with the condition that he serve 120 days in a community treatment center; he was also sentenced to a concurrent three-year probationary term on the substantive counts, and he was ordered to make restitution and to pay a $5,000 fine. Petitioner DeVora Cunningham was sentenced to a suspended six-month term of imprisonment, placed on two years' probation, and ordered to make full restitution and pay a $5,000 fine. Gov't C.A. Br. 2.

1. a. The evidence at trial showed that between February 21 and March 18, 1984, petitioners passed nine counterfeit $50 and $20 bills at five different locations in Detroit. The "central issue" at trial was whether they knew the bills were counterfeit when they passed them. Pet. App. 2-3, 8-9.

The government presented a great deal of evidence on this point. First, all the notes came from the same counterfeiting operation in Milwaukee, Wisconsin, for which Charles Johnson—who was DeVora Cunningham's brother-in-law—had furnished the paper. A Secret Service agent testified that Johnson had pleaded guilty to conspiracy for his role in the Milwaukee counterfeiting scheme. Johnson had stayed at petitioners' home immediately before the notes were passed, and there had been numerous tele-

phone calls between Johnson's residence and petitioners' residence and business before, during, and after the time of the charged conspiracy. Second, the government's evidence showed that one of the notes was passed *after* the telephone company informed petitioner Larry Cunningham that three of the bills he had used to pay his telephone bill were counterfeit. Third, one witness was able to identify Larry Cunningham as the person who passed a counterfeit bill because " 'he asked me if we had to check the bill and I never had anyone ask me that before' " (Pet. App. 2). Fourth, the prosecution produced evidence that petitioners inexplicably bought money orders with the counterfeit notes even though they had a checking account at the time. Finally, petitioners themselves offered various inconsistent explanations at trial about where they obtained the counterfeit bills. *Id.* at 2-3.

Petitioners' defense was that they had been "innocent dupes of a known criminal" (Pet. App. 8). They asserted that Johnson had had the opportunity to place the bills in a shoebox where they kept cash at their home (*id.* at 3). They said that the phone calls had been "innocent social conversations" between petitioner DeVora Cunningham and her sister (*ibid.*). Petitioners further asserted that they had not learned of Johnson's guilty plea until the trial in this case (*id.* at 8).

b. At trial, petitioners made a motion in limine to exclude certain evidence regarding Charles Johnson. They argued that the admission of evidence regarding Johnson's counterfeiting activities and petitioners' connection with him was unduly prejudicial, particularly since Johnson was not charged as a coconspirator. Petitioners did not specifically object to

the admission of Johnson's guilty plea, but only to the telephone logs and the bills from the Johnson operation. The government countered that its evidence was quite relevant to the key element in the case—petitioners' criminal intent. The district court ruled that the evidence would be admitted because its probative value was strong enough to substantially outweigh any danger of unfair prejudice. II Tr. 90-102; see also *id.* at 104-111; Pet. App. 4-5.

2. On appeal, petitioners narrowed their challenge to the "Johnson evidence" and attacked only the admission of his guilty plea. Petitioners contended that the guilty plea by Johnson was hearsay evidence from an unnamed co-conspirator, and that an inadequate foundation had been laid for its admission. See Pet. App. 5; Appellants' C.A. Br. 5-9.[1]

Because no hearsay objection was raised below, the court of appeals declined to address petitioners' hearsay claim or the government's counterargument that Johnson's guilty plea was admissible under Fed. R. Evid. 804(b)(3) as a statement against penal interest. Instead, the court of appeals reviewed the district court's finding that the guilty plea was properly admissible because, although prejudicial, it was relevant to the issues of petitioners' knowledge that the bills were counterfeit and their intent to defraud. Pet. App. 4-5.

The court of appeals held that admission of the guilty plea evidence was error because it was irrele-

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[1] In their appeal, petitioners also challenged an inadvertent misstatement of evidence in the government's closing argument. The court of appeals found that the error was harmless. Petitioners have not pursued that issue here. See Pet. App. 9-13.

vant under Fed. R. Evid. 401. The court reasoned that, because petitioners first passed the counterfeit bills in Detroit on February 21, 1984, and the government did not take action against Johnson's operation until February 23, 1984,[2] it was unlikely that Johnson pleaded guilty prior to the time petitioners passed the bills at issue in this case. Thus, the court concluded, the plea—and petitioners' presumed awareness of it—could have had no bearing on petitioners' criminal intent. Pet. App. 6-7.

The court of appeals further concluded, however, that " 'consider[ing] the trial record as a whole,' " the error was harmless. Pet. App. 8 (quoting *United States* v. *Lane*, No. 84-744 (Jan. 27, 1986), slip op. 7). The court stressed that other, undisputed evidence established that Johnson was a counterfeiter, and that it was the defense that made the most extensive use of Johnson's counterfeiting activities and "fleshed out" his relationship with petitioners. Pet. App. 8-9.

ARGUMENT

1. Petitioners first contend that the evidence of Johnson's guilty plea was improperly admitted because it was hearsay for which no proper foundation had been laid (Pet. 4-10). That claim plainly does not merit review. The court of appeals held that the guilty plea evidence was improperly admitted because it was irrelevant; it therefore can hardly matter if the admission of the evidence was also improper under a second theory. Moreover, as the court of appeals pointed out (Pet. App. 4-5), petitioners failed to make a hearsay objection at trial. Thus,

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[2] The record is silent as to exactly when Johnson pleaded guilty (Pet. App. 3).

the hearsay claim could prevail only if the admission of the evidence was "plain error" (see Fed. R. Crim. P. 52; Fed. R. Evid. 103(a) and (d)); there is no reason to suppose that the claimed hearsay violation was plain error when the court held that the admission of the evidence, albeit erroneous, was harmless.[3]

2. Petitioners also argue (Pet. 10-12) that the court of appeals erred in concluding that the admission of Johnson's conviction was harmless error. This fact-bound issue does not warrant review by this Court, and in any event the court of appeals was surely correct in concluding (Pet. App. 8-9) that the error was harmless. Petitioners nowhere explain how the admission of the plea could have prejudiced them. Johnson's activities as a counterfeiter and his connection with petitioners are not disputed and were well established by other evidence not challenged here.[4] Furthermore, as the court of appeals

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[3] In any event, petitioners' claim of a hearsay violation is groundless. The government did not purport to rely on the co-conspirator exception to the hearsay rule, so petitioners' discussion of the procedures under Fed. R. Evid. 801(d)(2)(E) (Pet. 5-10) is completely beside the point. Had a hearsay objection been made at trial, it is much more likely that the government would have argued that the guilty plea was admissible as a statement against interest within Fed. R. Evid. 804(b)(3) (Johnson had told the government that he would invoke the Fifth Amendment if called, so he was "unavailable"). See Gov't C.A. Br. 12-13; *United States* v. *Winley*, 638 F.2d 560, 561-563 (2d Cir. 1981), cert. denied, 455 U.S. 959 (1982).

[4] As noted above, the evidence at trial showed that the counterfeit bills passed by petitioners all came from the same Milwaukee, Wisconsin, counterfeiting operation; that Johnson had furnished the paper for that operation; that Johnson had stayed at petitioners' home just before the bills were passed;

pointed out, petitioners elaborated and relied on Johnson's criminal activities as part of their own defense; indeed, Johnson's guilty plea was stressed in petitioners' closing argument to the jury (*ibid.*).

The defense featured Johnson's role as a counterfeiter as part of its explanation of how the counterfeit bills came into petitioners' possession without their knowledge. According to the defense, Johnson took advantage of his relationship with petitioners by gaining access to the shoebox where they kept cash and by substituting his own counterfeit bills for the real ones petitioners had in the shoebox. Thus, far from being prejudicial to petitioners, the evidence of Johnson's counterfeiting activities was a principal feature of their trial strategy. See Pet. App. 3, 8-9.

Even if the "Johnson evidence" had been prejudicial to petitioners, and even if the force of that evidence would have been substantially undercut by the exclusion of Johnson's guilty plea, there was ample other evidence of petitioners' criminal intent. Petitioner Larry Cunningham passed an illegal note *after* he had been told by the telephone company that the bills were counterfeit; his behavior when passing another note evidenced knowledge that the note was counterfeit; petitioners purchased unnecessary money orders with the notes; and they gave inconsistent explanations for where they obtained the bills. The court of appeals was therefore correct in concluding that any error in the admission of the guilty plea was plainly harmless.

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and that there were numerous telephone calls between Johnson's residence and petitioners' residence and business office around the time petitioners passed the counterfeit bills.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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